

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

MIMI'S SWEET SHOP, INC.,

Plaintiff, No. 1:18cv337

vs.

CHARTER TOWNSHIP OF LANSING  
DOWNTOWN DEVELOPMENT AUTHORITY, ET AL.,

Defendants.

Before:

THE HONORABLE JANET NEFF,  
U.S. District Judge  
Grand Rapids, Michigan  
Monday, August 13, 2018  
Promotion Conference Proceedings

APPEARANCES:

Perrone Law, P.C.  
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On behalf of the Plaintiff;

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On behalf of Steven Hayward,

MR. THOMAS MEAGHER  
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On behalf of Lansing DDA, et al.,

1 MR. MICHAEL F. MATHESON  
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On behalf of Towneast LLC, et al.  
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9 REPORTED BY: MS. KATHY J. ANDERSON, RPR, FCRR  
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August 13, 2018

PROCEEDINGS, 1:25 p.m.

THE COURT: Okay. This is the date and time set for a premotion conference in case number 1:18cv337, Mimi's Sweet Shop versus Lansing Township, Downtown Development Authority, et al. Counsel, would you please put your appearances on the record for me.

MR. PERRONE: Jacob Perrone on behalf of Mimi's Sweet Shop.

MR. NOLAND: Craig Noland on behalf of Steven Hayward.

MR. MEAGHER: Tom Meagher for Lansing Downtown Development Authority.

MS. COLLINS: Allison Collins for Lansing Downtown Development Authority.

MR. MATHESON: And Michael Matheson on behalf of Towneast, LLC, Towneast Parking, LLC, Eastwood, LLC and Michael Eyde.

THE COURT: Okay. The first thing I want to talk to you about, this may be a little upside down, but I am going to decline supplemental jurisdiction over any state law claims. Now, if you have really strong objections to that, you're going to have to brief the issue as to why I should maintain that jurisdiction.

The second thing is honestly I found this case a little bit confusing. With all of these counts -- I'll tell

1       you honestly, whenever I see a case that seems relatively  
2       simple but is pled in 11 different counts, I have a form of  
3       radar that goes up that says there's something not right here.

4               This seems like a fairly straightforward contract  
5       case, and yet we have RICO civil conspiracy. It just seems  
6       very unnecessarily complex because I don't think it is complex.

7               There's also the plaintiff's responses are long,  
8       longer than my guidelines provide. They are wordy, and I would  
9       have to say that if the remaining pleadings I see are as  
10      unnecessarily wordy as the seven-page single spaced response,  
11      there's a good chance they will be stricken.

12              What else? There was something else I wanted to say.

13              Oh, I think to some extent there may be a fundamental  
14      misunderstanding of what a 12(b)(6) motion is all about because  
15      there's a discussion of discovery. There isn't any discovery  
16      in a 12(b)(6) motion. They are resolved on the pleadings. And  
17      with the decisions that the Supreme Court issued, I don't know,  
18      five years or so ago in Iqbal and Twombly, there's a relatively  
19      high bar, in some instances I think a little bit unfairly, but  
20      nevertheless, those are the rules we have to follow.

21              So why don't we start with the -- another question I  
22      had somewhere I seem to remember that the illegal delegation of  
23      authority was intended to be pled under 1983, is that right?

24              MR. PERRONE: Correct. It just was not specified.

25              THE COURT: It just wasn't what?

1 MR. PERRONE: I didn't include the citation under the  
2 heading. That was my omission.

3 THE COURT: Well, I have a hard time seeing how you  
4 get there. But nevertheless, let's start with the Township of  
5 Lansing and the DDA request for the right to file a 12(b)(6)  
6 motion. Hello.

7 MR. MEAGHER: Well, Judge, I wasn't sure if that meant  
8 it's on me.

9 We believe that none of the causes of action state a  
10 claim. The RICO claims we believe could not even be asserted  
11 against the DDA as a governmental entity. Even if they could,  
12 we don't think there are predicate acts pled. We don't think  
13 the other elements of the RICO claim are properly pled.

14 We have listed our response to each of the causes of  
15 action, and in each case we find it very difficult, I'm not  
16 saying this in any particular way, but I find it difficult to  
17 respond to the pleading because so many of the paragraphs, so  
18 many of the allegations have multiple sentences. For example,  
19 leaving the form to the side, I don't think that any of the  
20 criminal statutes could apply. Again, because there's no  
21 intent on the part of the DDA. The several criminal statutes  
22 are not proper predicate acts for a RICO claim. Several of the  
23 criminal statutes don't provide for a private cause of action  
24 so there's no stand alone basis for those to be pursued.

25 You've already taken care of supplemental jurisdiction

1 for us.

2 One of the acts under the Interstate Land - help me  
3 out here - Sales Act claim, that's not proper because we are  
4 talking about a lease within a building, we are not talking  
5 about the real estate. So I don't think that claim could be  
6 pursued.

7 We don't see proper allegations for an antitrust  
8 claim.

9 And I'm not sure if that covers all the claims, Judge,  
10 but we tried to specify why each of the claims we believe are  
11 insufficient as pled.

12 THE COURT: Well, as we know, Mr. Perrone, civil RICO  
13 claims are very, very difficult to pursue, tend to be pretty  
14 expensive to pursue as well. So I would like to hear your  
15 responses to what sounds like a pretty carefully thought out  
16 motion.

17 MR. PERRONE: Again, as it relates to the DDA, I think  
18 supplemental jurisdiction would be appropriate given their  
19 intimate relationship with the players in the RICO case. And  
20 what we have is a case where you have multiple individuals that  
21 are controlling the pools of funds and the marketing and  
22 leasing at this project. They will try to minimize it as just  
23 a contract dispute, but it was the outside activities that  
24 constituted the RICO.

25 You had promises that were made to numerous

1 individuals as far as the development, and the development was  
2 never followed through on. It was in the process procedurally  
3 delayed by these numerous individuals that were involved,  
4 various entities. As to their actions in blocking  
5 administratively they were all memorialized in a specific  
6 agreement. If you look at the agreements, the agreement for  
7 the Towneast in and of itself was a public/private partnership  
8 that exceeded its authority and allowed for the private  
9 individuals in this case to act in concert in various manners,  
10 one of which was delaying construction projects to delay  
11 development, the other was hand picking who got certain  
12 construction.

13 THE COURT: What's the enterprise?

14 MR. PERRONE: The enterprise is the entire project.  
15 The enterprise is the people that are affiliated with it. The  
16 enterprise comes down to the influence, the people that were  
17 influencing the DDA, that turned the faucet on for the funds  
18 for the project in and of itself.

19 THE COURT: How do you respond to the arguments that  
20 are made with regard to the criminal statutes which don't  
21 appear to provide for a civil remedy?

22 MR. PERRONE: He is saying that the DDA can't be found  
23 guilty of the criminal statutes because of the intent.

24 THE COURT: Well, he's also saying that there are  
25 several criminal statutes that you've pled which do not provide

1       you with a civil cause of action.

2               MR. PERRONE: As far as the Land Sales Act, that is  
3 something that it appears he would be correct on.

4               THE COURT: Are you withdrawing that claim?

5               MR. PERRONE: Yes.

6               THE COURT: Fair enough. Progress is made. Okay. Go  
7 ahead.

8               MR. PERRONE: In regards to the RICO claims, I think  
9 that they are adequately pled with the facts as stated in the  
10 complaint.

11               It establishes a pattern of racketeering activity,  
12 numerous predicate acts.

13               The Sherman Price Fixing Act, I withdraw that claim  
14 also.

15               THE COURT: Say that again, please.

16               MR. PERRONE: The Sherman Price Fixing Act, I withdraw  
17 that claim.

18               THE COURT: Okay. That leaves six causes of action.

19               MR. PERRONE: Those are the remaining RICO, that make  
20 up the RICO claims.

21               THE COURT: Four of them are RICO, one is control,  
22 which I don't quite understand, and the last one is a civil  
23 conspiracy. Rita, what questions do you have?

24               THE LAW CLERK: I just want to make sure we are on the  
25 same page. So Counts 1 through 4 are your RICO claims.



1 MR. PERRONE: Yes.

2 THE LAW CLERK: Okay. And not Count 7 and 8, is that  
3 correct? Sometimes I feel like you're lumping them together.

4 MR. PERRONE: Yes.

5 THE LAW CLERK: So four RICO claims and two other  
6 federal claims.

7 MR. PERRONE: Correct.

8 THE LAW CLERK: Okay.

9 THE COURT: Okay. Anything else with regard to the  
10 DDA?

11 THE LAW CLERK: May I ask one more question?

12 THE COURT: Sure. Absolutely.

13 THE LAW CLERK: So Count 1 is RICO and 1983 or can you  
14 clarify that for me?

15 MR. PERRONE: Count 1, yes, I was trying to use  
16 multiple causes of action with the illegal delegation of duty  
17 as one of the instances of pattern of racketeering. The  
18 agreement in and of itself was an instance. That was obtained  
19 through color of right.

20 THE COURT: Mr. Meagher, any response?

21 MR. MEAGHER: Not right now, Your Honor, thank you.

22 THE COURT: All right. Let's hear from Hayward.

23 MR. NOLAND: Just to kind of echo what Mr. Meagher had  
24 said, three major points I guess or general points.

25 One is I had the same kind of reaction when I looked

1 at the complaint, again, tried to digest what's the gravamen of  
2 the claim, what really operates as the damages or the harm or  
3 the wrong.

4 You know, we have a lease agreement that was signed.  
5 It's very detailed. And so I guess at first blush I had a kind  
6 of similar, like wait a minute, why are we in federal court.

7 And I'll confess, Judge, I do not -- my experience  
8 with RICO is somewhat limited. We have put together, you know,  
9 a draft brief, and what we are focusing on is to navigate  
10 factual allegations specific to our client versus generalized  
11 conclusory allegations which, you know, under the standard for  
12 even a Rule 12(b)(6) does not suffice.

13 And one thing that jumped out at me in reading the  
14 complaint on the first page I think of the complaint is that an  
15 allegation that Mr. Hayward is being sued in his official  
16 capacity acting on behalf of the DDA. And if we are now, and I  
17 guess I wasn't -- I didn't pick up on the idea that we are  
18 dealing with a 1983 claim. But even if we are, you know, we  
19 have, I guess I have a question as to whether or not  
20 Mr. Hayward is being sued in his official capacity on that type  
21 of claim or individual capacity. It's something I didn't even  
22 think about. But I think it's something that would be helpful  
23 moving forward.

24 So and I know there was reference to amending the  
25 complaint, discovery. I don't, I think based on these

1 pleadings, it's challenging because of the form; the fact we  
2 have got multiple players, moving parts, kind of paragraph  
3 allegations. It would be tempting to ask the Court if we are  
4 moving forward to have plaintiff amend the complaint to track,  
5 you know, each defendant and each theory and operative facts.  
6 But given -- that's more of a form issue.

7 THE COURT: Well, actually it really, it's a  
8 substantive issue as well. Because you're right, I think at  
9 least when Rita and I discussed this and I read the complaint,  
10 I had the same sense of there's no real direction here.  
11 There's no real organization. And particularly when you have  
12 multiple defendants like this, it's very, very difficult to  
13 understand.

14 So, Mr. Perrone, why don't you sort of jump in right  
15 there.

16 MR. PERRONE: I can definitely amend so it is a little  
17 bit easier to read and the operative facts point out a little  
18 bit more as far as the individual specific instances where the  
19 RICO predicates occurred, one of which was the Bar Louie, I  
20 tried in setting it up initially to organize it in a way that  
21 broke it down as simply as possible given the complexity of  
22 dealing with RICO, but I would be open to amend just to try to  
23 articulate a little bit better to allow them to respond  
24 appropriately.

25 THE COURT: Rita, what questions do you have with

1       regard to Mr. Hayward?

2               THE LAW CLERK: I think his name is spelled  
3       incorrectly too.

4               MR. NOLAND: Yes, the middle initial is wrong.

5               THE LAW CLERK: We want to make sure we have the  
6       right --

7               MR. NOLAND: The caption has it as Steven M., it's  
8       actually Steven L.

9               THE COURT: Let's make sure when the amended complaint  
10      is filed that it is properly designated, please.

11              THE LAW CLERK: And I think, Judge Neff, you may -- I  
12      believe, Mr. Perrone, you also mentioned the possibility of  
13      adding other defendants or other claims. You may --

14              MR. PERRONE: Correct. I've been --

15              THE LAW CLERK: I'm not sure if that is what we are  
16      talking about for a second amended complaint so you may want to  
17      clarify that.

18              MR. PERRONE: I have been contacted by some other  
19      individuals associated with the project who have some interest  
20      in potentially involving themselves in the same litigation. I  
21      also had a little bit of information that may supplement in an  
22      amended complaint. And that may or may not include adding the  
23      parties that I have discussed the situation with.

24              THE COURT: How long are you going to take? How long  
25      is it going to take you to figure that all out?

1 MR. PERRONE: I could get it turned around in 30 days.

2 THE COURT: Okay. Anything else, Rita?

3 THE LAW CLERK: Only if you get up to a briefing  
4 schedule, leave me a spot to talk about my concerns.

5 THE COURT: I don't think we are going to get that far  
6 today. Okay. The remaining defendants. Mr. Matheson.

7 MR. MATHESON: Thank you. Again, I would echo my  
8 colleagues's comments regarding what I feel as though I'm kind  
9 of grasping in thin air here to decipher what claims are  
10 actually asserted against my clients, and there is four of them  
11 at this point, and that may change down the road. But I can't  
12 even make an assessment of where these claims are currently  
13 situated without the identification of whether it's Towneast,  
14 what involvement is Towneast Parking, LLC and these other  
15 entities.

16 Mr. Perrone is sitting across the table from me, so  
17 with all due respect, I mean it just seems to be all over the  
18 place. And we have still got this Count 7 that's dropped in  
19 with control. And is that part of the RICO claim? I mean I  
20 heard Counts 1 through 4 are RICO but then this Count 7 is  
21 dangling out there.

22 I understand Your Honor is heading toward the  
23 direction of allowing Mr. Perrone to amend the complaint, but  
24 there really needs to be a distilling of this RICO claim so  
25 that even if the parties are identified separately, that that

1 RICO claim still stands on its own without having to refer to  
2 multiple and different counts in the complaint.

3 It's just -- I'm not a RICO civil conspiracy expert,  
4 but I think I can figure things out, and I've just had an  
5 extremely challenging time doing that.

6 And there's references to in Count 2 the Hobbs Act and  
7 bringing up fiduciary duties. I mean where do fiduciary duties  
8 come into this civil RICO matter?

9 So there's just multiple allegations within the same  
10 paragraph, not identifying the defendants separately, which  
11 really created the problems with responding to the complaint.

12 And the other thing that, maybe this isn't a pleading  
13 issue, but it's almost like there is an inference of nefarious  
14 intent just by these entities and individuals doing business  
15 together. I mean that's not a civil RICO claim which is why in  
16 the request for the pre-motion conference I brought up the  
17 requirement that to establish these predicate acts and to  
18 support the civil RICO claim that there's got to be some more  
19 specificity in the time, place, and content of these  
20 representations because we have got multiple agreements and  
21 approvals by the township, and Mr. Perrone's client is aware of  
22 all of these things that transpired. There's nothing hidden or  
23 secretive to this. There's mountains of documents pertaining  
24 to these transactions, and there has to be more in terms of the  
25 pleading specificity rather than just general references to a

1        lease here or there or some communications that somebody may  
2        have had in a conference in Las Vegas. That doesn't satisfy  
3        the pleading requirements for a civil RICO case, and if that's  
4        what we end up with, we are going to be back with a 12(b)(6)  
5        motion for failing to specify those requirements to satisfy a  
6        civil RICO claim.

7                THE COURT: Well, I can tell you that in my experience  
8        I can't think of a single civil RICO case that was pled with  
9        any degree of understanding what that cause of action is really  
10       all about. I don't know why that is. I don't know whether it  
11       is such, it's an area of such esoteric understanding, or if  
12       it's just pleaders who are sort of out of their comfort zone.  
13       But this case fits right in there.

14               And if there is going to be an amended complaint,  
15       which I think I'm leaning very strongly towards, you're going  
16       to have to do the two things that Mr. Matheson just identified.  
17       You're going to have to, first of all, untangle these multiple  
18       allegation counts and paragraphs that seems to go on forever.  
19       And secondly, you're going to have to be much more cognizant of  
20       which defendants you are accusing of what. Because I had a  
21       hard time, I had a heck of a time trying to figure that out.  
22       And I didn't spend the kind of time that I'm sure defense  
23       counsel has spent trying to figure it out, and it really isn't  
24       my job to figure it out. It's plaintiff's counsel's job to  
25       make his claims clear and unmistakable so that defendants can

1 properly respond. And honestly, I don't see how, because this  
2 is so confusing, I don't see how we could have a 12(b)(6)  
3 motion at this point. We just don't have any organization or  
4 coherence in this complaint.

5 Rita, what further do you have?

6 THE LAW CLERK: I'm good. Thank you.

7 THE COURT: Okay. So in addition to the order which  
8 is going to come out of this conference that says I'm not  
9 accepting supplemental jurisdiction subject to Mr. Perrone's  
10 briefing if he wishes to do that, it's going to be an  
11 amendment, a second amended complaint may be filed within  
12 30 days, and it must adhere to the pleading discussions had at  
13 this conference, including paragraphs which state more than one  
14 claim or cause of action are to be recast properly, and the  
15 second thing that is going to have to happen in this amended  
16 complaint is that it must be clear precisely which defendants  
17 are being charged under each count of the complaint.

18 I would also urge you, and this is going to be in the  
19 order as well, that when you redraft your complaint you really  
20 seriously and carefully think about whether you are prepared to  
21 go ahead with an eight-count complaint which includes four RICO  
22 counts.

23 Again, you know, I don't really understand all of the  
24 counts, I'll be really honest with you. And you've got to do  
25 that. You've got to make it understandable, not only to the



1 defendants but to the judge as well.

2 THE LAW CLERK: Would you like the order to deny the  
3 premotion conference request without prejudice?

4 THE COURT: Yes, yes, yes. At the end of 30 days  
5 after we've seen the amended complaint, then I think defense  
6 counsel is going to have to decide whether based on the amended  
7 complaint you want to proceed again with a Rule 12(b)(6)  
8 motion. And I really do think you're going to have to just  
9 replead it. I just, if Mr. Perrone complies with my concerns  
10 and your concerns about this complaint, if he does clean it up  
11 to the point where we can understand it, then defense counsel  
12 will have 14 days to determine whether they wish another  
13 premotion conference or whether they want to proceed to answer.

14 What else do we need in the order, Rita?

15 THE LAW CLERK: I think that's everything. Yes. So  
16 obviously the answer deadlines are extended. Suspended may be  
17 is a better word.

18 THE COURT: If you do add additional defendants,  
19 you're going to have to wait and see whose going to represent  
20 them if they're current defense counsel; if there are other  
21 defense counsel going to come in here, we will have to use the  
22 jury room for any further premotion conference.

23 MR. MATHESON: Is that additional defendants or  
24 additional plaintiffs?

25 MR. PERRONE: Defendants and possibly plaintiffs.

1 MR. MATHESON: Okay.

2 MR. MEAGHER: Judge, if new parties are added do we  
3 stay with the 30-day time frame if they are going to have a  
4 different time frame for answering the complaint?

5 THE COURT: That's his time frame, 30 days to amend  
6 and that will include adding parties. At that point, well,  
7 probably what the order should say is that if no defendants are  
8 added, then the current defendants will have 14 days to decide  
9 whether to seek a second premotion conference. If there are  
10 added defendants, then I think I should give you at least  
11 30 days to try to, or to wait and see who will be representing  
12 those parties, and you may, defense counsel may want to in some  
13 way collaborate on your, what you want to do next. I really  
14 would urge you to spend sometime discussing your defenses  
15 together. It sounds like a lot of what you are concerned about  
16 you have in common, and what that suggests to me is that a  
17 more, a single approach rather than separate approaches with  
18 regard to potential dispositive motion.

19 I don't really, I haven't really thought that through,  
20 but some sort of coordination makes sense to me where,  
21 particularly with regard to the RICO issues, your concerns are  
22 all the same. And frankly, those are the same kinds of  
23 concerns I always see in civil RICO pleadings where the  
24 defendants have the same sense of, you know, the enterprise  
25 isn't properly identified, the predicate acts aren't

1 sufficient, and so forth. So give that some thought if you  
2 would. Maybe it's not possible. I don't know. Maybe you guys  
3 are not good friends. But just give it some thought.

4 Have you got any questions, comments, concerns?

5 MR. MEAGHER: I do have, Judge. I raise the question  
6 on behalf of the DDA, the fact that we could not be responsible  
7 for a RICO claim because we could not form the requisite  
8 intent. And I don't know, you know, if we want to press that  
9 in terms of what should and should not show up in any amended  
10 complaint. If I'm right, I don't see any point in having those  
11 RICO claims against the DDA.

12 THE COURT: Well, I think, Mr. Perrone, you should  
13 consider that. I don't have a sense of that. You know, my  
14 sort of gut reaction is you're probably right. But unless you  
15 want us all to go off chasing a wild hare, think about that.  
16 And act accordingly when you redraft your complaint.

17 Are there any other concerns?

18 MS. COLLINS: Your Honor, you had mentioned that if he  
19 was going to file supplemental briefing related to objecting to  
20 supplemental jurisdiction but I'm not sure you set a time  
21 frame.

22 THE COURT: Within that same 30 days. Yeah. And  
23 defense counsel should advise me if they wish to respond. If  
24 he files a brief objecting to the dismissal of the supplemental  
25 jurisdiction denial, then defense counsel should advise me

1       whether they wish to respond. And, again, it seems to me that  
2       for that kind of a situation in particular, a single  
3       coordinated response on behalf of all the defendants might make  
4       some sense. You might want to designate one of you to be the  
5       drafter.

6               Anything else I can help you with this afternoon?

7       Okay. Great. Thanks so much.

8               MR. MEAGHER: Thank you, Your Honor.

9               MR. PERRONE: Thank you, Your Honor.

10              (Proceedings concluded, 1:59 p.m.)  
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## REPORTER'S CERTIFICATE

I, Kathy J. Anderson, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Kathy J. Anderson

Kathy J. Anderson, RPR, FCRR

U.S. District Court Reporter

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